

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
:   
SOKOLOW, et al, : 04-CV-397 (GBD)  
:   
Plaintiffs, : May 17, 2013  
:   
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :  
:   
Defendants. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: ROBERT TOLCHIN, ESQ.  
RACHEL WEISER, ESQ.  
The Berkman Law Office, LLC  
111 Livingston Street  
Brooklyn, New York 11201  
  
KENT YALOWITZ, ESQ.  
PHILIP HORTON, ESQ.  
TAL MACHNES, ESQ.  
Arnold & Porter  
  
For the Defendant: BRIAN A. HILL, ESQ.  
Miller & Chevalier, Chtd.  
655 15th Street NW, #900  
Washington, D.C. 20005  
  
Court Transcriber: SHARI RIEMER  
TypeWrite Word Processing Service  
211 N. Milton Road  
Saratoga Springs, NY 12866

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 [Telephone recording fades in and out.]

2 THE COURT: Good morning. This is Judge Ellis. Can  
3 I have your appearances beginning with the plaintiffs?

4 MR. TOLCHIN: Good morning, Your Honor. This is  
5 Robert Tolchin from the Berkman Law Office for the plaintiff.  
6 With me on the phone is Kent Yalowitz and Phil --

7 MR. YALOWITZ: Good morning, Your Honor. Kent  
8 Yalowitz from Arnold & Porter. My colleagues Phil Horton and  
9 Tal Machnes are on the line. Mr. Horton has a pro hac  
10 application pending --

11 THE COURT: For me?

12 MR. YALOWITZ: Well, you just file it in the case. I  
13 don't know if it's before you or Judge Daniels but we were  
14 relieved to see that the clerk's office has approved it as non  
15 deficient. So it looks like it's ready to be acted on by the  
16 Court.

17 THE COURT: Okay.

18 MR. HILL: Your Honor, it's Brian Hill for the  
19 defendants.

20 THE COURT: This is a conference in Sokolow v.  
21 Palestine Liberation Organization, et al., 04-CV-397. It is  
22 Friday, May 17<sup>th</sup> at approximately eleven a.m.

23 The first thing I want to do is I want to remind the  
24 parties that it's not a good practice to be sending things a  
25 day or two before the conference. Your assumption is that we

1 have nothing else to do and we'll drop everything and look at  
2 those papers so that we can be prepared for the conference.  
3 It doesn't work that way. We make every effort to look at  
4 anything that comes in but as you might imagine a lot of paper  
5 comes into chambers. So if you really want something to be  
6 considered you really need to get it in more advance than the  
7 date for or the day of.

8 MR. HORTON: Your Honor, this is Phil Horton. We  
9 certainly understand that. We got these papers in as quickly  
10 as you can. As you know we are -- my firm is new to the case.  
11 Two of the papers we filed yesterday are responses to letters  
12 filed by Mr. Hill. The other two are new requests for relief  
13 by us which we certainly did not anticipate that the Court  
14 would be reviewing and picking up today. We just wanted to go  
15 ahead and file them since they were ready to file.

16 THE COURT: Indeed to the extent that they raise new  
17 issues we didn't actually really look at those. We did  
18 determine that some of them were responsive to other things  
19 that had been filed and try to incorporate that into the  
20 rulings today.

21 Before I get to the rulings, there was one issue  
22 that was raised by the parties that I wanted -- it may not be  
23 the most -- it may not be the biggest issue that I have to  
24 decide but it concerns these 15 photos. I'm not exactly sure  
25 what exactly the parties' positions were. Is it that the

1 defendants have asked for information about the source of the  
2 photos and the plaintiffs have declined to provide that  
3 information? Is that the gist of it?

4 MR. HILL: Your Honor, this is Brian Hill. I think  
5 you have the gist right. We have served both document  
6 requests and interrogatories that would have required the  
7 production or if a claim of privilege is made a log of any  
8 communications about when plaintiff's counsel got these photos  
9 or where they came from and to date the plaintiffs have said  
10 that they're not going to tell us -- they're not going to give  
11 us the communications and they're not going to log them. So  
12 we're asking that as a consequence of that they not be allowed  
13 to use the photos.

14 We're also asking, as the letter pointed out, that  
15 they not be allowed to use the photos because they were not  
16 produced prior to the close of discovery.

17 THE COURT: I don't recall actually seeing a very  
18 specific response of the plaintiffs on this.

19 MR. HILL: I don't believe one has been served, Your  
20 Honor.

21 THE COURT: What is the plaintiff's response?

22 MR. YALOWITZ: Your Honor, this is Kent Yalowitz.  
23 As I understand the situation there are no responsive  
24 communications to the requests that the defendant has made and  
25 the source of the photos is work product and the plaintiffs

1 are not prepared to share the -- to create documents or  
2 information in order to prove the defendants with that  
3 information.

4 THE COURT: You're claiming that the photos are work  
5 product. [Inaudible - phone cuts out] kind of work product are  
6 we talking about?

7 MR. YALOWITZ: No, sir, not the photos. The source,  
8 the investigative source. So where we got them, how we got  
9 them, from whom we got them. Attorney work product.

10 THE COURT: Those that were shown to a witness for  
11 purpose of identification?

12 MR. YALOWITZ: Not the photos themselves. The photos  
13 themselves are not work product. They've been produced.

14 THE COURT: No, no, I understand but I want to  
15 know -- you don't want to give the source of the photos. I  
16 want to know how relevant the photos are, the source of the  
17 photo be. So what --

18 MR. YALOWITZ: The photos themselves are certainly  
19 relevant because the witness ID'd the shooter based on the  
20 photos and obviously it's our burden to link the names of  
21 the -- to link the identity of the shooter back to the photo.  
22 So they're important. It's an important photo.

23 THE COURT: I recognize that. My concern is that to  
24 the extent that you have that burden how does the defendant  
25 get to respond to your attempts to do that linkage if they

1 don't have any information about the source?

2 MR. YALOWITZ: Well, I think that we have to -- I  
3 think we're going to have to come forward with, either with a  
4 witness or with some basis to -- for the jury to conclude that  
5 the shooter in the photo or the individual in the photo is who  
6 we say he is and so -- for example, as I understand it,  
7 there's something called a martyr file and this fellow had a  
8 Palestinian Authority martyr file which the defendants have  
9 produced and people can compare that photograph, the jury can  
10 compare the photograph in the martyr file with the photograph  
11 that we've produced and reach their own conclusion about  
12 whether he is or is not the shooter. There also may be fact  
13 witnesses who could look at the photo and ID the individual  
14 but we're -- to the extent we have any documents they  
15 obviously have to be produced and we're not planning to rely  
16 at trial on documents relating to this individual if we don't  
17 produce the documents in advance.

18 THE COURT: And rightfully so. But -- and so you do  
19 recognize that this may become an issue at trial as to whether  
20 or not you can use the photograph?

21 MR. YALOWITZ: Yes, I've been thinking about that.

22 THE COURT: Apart from the issue that we're  
23 discussing because obviously the means that you're talking  
24 about authenticating who's in the photo leaves something to be  
25 desired.

1 MR. YALOWITZ: It does. One might conclude that,  
2 Your Honor.

3 THE COURT: Well --

4 MR. HILL: Your Honor, could I briefly be heard? I  
5 think there is an independent relevance to the source  
6 regardless of connecting the dots of whether the person in the  
7 photo is who the plaintiff's lawyers have claimed they are,  
8 and that is -- Your Honor disallowed discovery from the  
9 defendants of these sorts of photographs. If the plaintiffs  
10 have in fact obtained them from my client there's a whole host  
11 of issues that are raised there and I think we're entitled to  
12 discovery on that issue. I mean there may be a violation of  
13 the no contact rule. At this point we have no idea of the  
14 providence of these photographs other than Mr. Tolchin showed  
15 up at a home in Brooklyn in February and gave them to Ms.  
16 Gueda.

17 The notion that there are no communications I think  
18 there may be a bit of a dodge here. There may be no written  
19 communications but surely these documents did not just appear  
20 in Mr. Tolchin's custody at some point prior to February 17<sup>th</sup>  
21 with no knowledge by any agent of the plaintiffs as to how he  
22 obtained them or how that particular group of photographs was  
23 selected. I mean we are preparing an expert on the  
24 reliability of the photo array that Ms. Gueda observed that  
25 Mr. Tolchin provided to her, and what went into the photo, the

1 selection, who the other people in the array are which has not  
2 been disclosed to us is all relevant to the reliability of  
3 this photograph selection by Mrs. Gueda. So independent of  
4 whether there will be some way of proving that the photo she  
5 picked is who they say it is, all of this is relevant  
6 discovery and should be allowed.

7 THE COURT: Well, I hear what you're saying although  
8 I don't -- I don't quite follow how the source of the  
9 photograph is particularly relevant to whether or not the  
10 array is appropriate.

11 MR. HILL: It may reflect a violation of the Court's  
12 order. The Court sustained our objection to the production of  
13 these materials. If what has happened is that the plaintiffs  
14 have outside of the Court and contrary to the Court's order  
15 obtained these from my clients that would be a very serious  
16 issue. It would be a violation of the Court's order and a  
17 violation of the no contact rule of the attorney ethics rules.

18 MR. YALOWITZ: It doesn't sound like it would be a  
19 violation of any order for --

20 THE COURT: The prob --

21 MR. YALOWITZ: I'm sorry, Your Honor.

22 THE COURT: The issue -- we can speculate about a lot  
23 of things but as I understand it you -- what you're  
24 suggesting, Mr. Hill, would require a number of violations and  
25 other than your stating that that's a possibility that it



1 could have happened I don't see any evidence to suggest that  
2 anything was done that was violative of any of orders.

3 MR. HILL: Well, exactly, Your Honor, and that's  
4 precisely the point. I mean there's no log indicating who was  
5 communicated with or when. We just have an unvarnished claim  
6 of attorney work product. Frankly, it may not be a privilege  
7 and I might be entitled to get that but I don't even have a  
8 log so I can move to compel the communications at this point.

9 THE COURT: Well, we'll get to that.

10 Let me address the issues that have been raised.  
11 The overriding issue, the overarching issue, the main issue  
12 has to do with to me the scheduling of the expert depositions  
13 and I've reviewed what the parties have said and basically  
14 tried to figure out what's going to cause the fewest  
15 complications in terms of the issues that have been raised.  
16 Since some of the issues to me depend on the scheduling of the  
17 depositions I am -- I'm going to agree with the plaintiffs on  
18 the scheduling, that is it seems to me that the subsidiary  
19 issues that have been raised concerning where the deposition  
20 is taking place, the timing of the production of documents,  
21 the preparation of the parties respective experts would be  
22 more efficiently done if the depositions were taken after the  
23 reports had been finished by all the parties.

24 To the extent that the plaintiffs have raised the  
25 issue concerning the fact that some of their expert opinions

1 might change after the deposition of the plaintiff's experts,  
2 what I will grant the plaintiffs in this case is the ability  
3 to supplement their reports after the plaintiffs' experts have  
4 been taken so that -- if necessary. I don't know if there  
5 would be a need to do any supplementation after the  
6 depositions but I will allow the defendant to raise that as an  
7 issue and although it's not provided for now if the defendants  
8 can indicate -- can show that something that was said in a  
9 deposition is cause for revision then they can make that known  
10 to me. They will have my ear.

11 MR. HILL: Your Honor, this is Brian Hill. I think I  
12 either misheard you or maybe you misspoke although I hesitate  
13 to suggest that. Are you saying that if after the defendants  
14 depose the plaintiff's experts --

15 THE COURT: Correct.

16 MR. HILL: -- defendant's experts wish to submit a  
17 supplemental report they can do so?

18 THE COURT: That's correct.

19 MR. YALOWITZ: Well, upon a showing of good cause.

20 THE COURT: It's not an absolute because the issue  
21 that you raised I consider to be a real concern, that is if  
22 there's a need to adjust the defendant's report because of  
23 something that's said in the deposition then you can make that  
24 known to me. You'll -- you get the benefit of a doubt but it  
25 won't -- I don't expect you to ask for it unless it's

1 necessary because I'll be obviously reviewing it to make sure  
2 that it was occasioned by the testimony.

3 MR. HILL: Understood. Thank you, Your Honor.

4 THE COURT: This also addresses the question of where  
5 the depositions are to take place. I think in general given  
6 the location of those eight experts, my inclination now is  
7 that the depositions will take place in Israel and that the  
8 plaintiffs -- the attorneys will travel rather than the  
9 experts rather than us trying to figure out all of the  
10 logistics of the travel of the experts. Again, you'll take  
11 the experts -- you'll look at the report. You may decide you  
12 want to take all of them, you don't want to take all of them.  
13 We'll know the full scope of who the experts are and we'll  
14 address [inaudible - phone cuts out] in the context of knowing  
15 exactly who's going to be deposed but that requires the  
16 parties to coordinate at least the lawyers and try to get  
17 those experts all thinking about a good time frame.

18 With respect to the plaintiff's application for an  
19 extension of time to bring their expert reports into  
20 compliance, I'm still not exactly sure how I rule on the  
21 question of compliance although I know the submissions by the  
22 parties don't quite agree on whether or not the -- there's a  
23 total deficiency or whether or not some of it --

24 MR. HORTON: Your Honor, this is Phil Horton. If I  
25 can help. I think where we are, there's been a tremendous

1 back and forth between the two sides on the expert reports.  
2 We had provided a tremendous amount. Mr. Hill has taken the  
3 position with respect to some of the reports that we still  
4 haven't done enough. We've continued to send the materials on  
5 some of the issues where he thinks we haven't done enough. We  
6 think we have and he just sent a number -- a second series of  
7 emails just the other day raising numerous questions, things  
8 such as well, I don't quite understand what the expert says  
9 here, you need to clarify your report, frankly which is all  
10 the sort of thing which we think should be done in  
11 depositions, not by trying to nitpick the language of reports.

12 But what I would say is that we are substantially  
13 completed this process although we may end up in disagreement  
14 with them but we're sort of down to what in construction you  
15 might call a punch list. The house is built and he's  
16 complaining this tile is not quite in place or you didn't --  
17 you failed to paint that corner and we're trying to come to  
18 closure on that. I think that's a good description of where  
19 we are now.

20 THE COURT: Mr. Hill, you need not comment on the  
21 analogy.

22 MR. HILL: Okay. Because I would have a different  
23 one as Your Honor could expect. Let me give you some facts  
24 instead of an analogy. For Mr. Karsh whose report was served  
25 on March 25<sup>th</sup>, we still do not have 98 out of 110 footnote

1 sources of his material, and even though we raised this with  
2 the plaintiffs and we complained about it to Your Honor on  
3 April 17<sup>th</sup>, a month ago today. We have received nothing on Mr.  
4 Karsh and, Your Honor, one of the fundamental differences  
5 between the parties is that we think your orders matter and  
6 your deadlines matter and these plaintiffs have not served  
7 their requests in January when they were due. They asked for  
8 an extension until March. They served reports that were not  
9 in compliance with the rule. They asked for time to bring  
10 them into compliance. They've blown their own deadline and  
11 with Mr. Karsh they've given us nothing at all. They haven't  
12 given us any of the documents we've asked for from these  
13 footnotes. They've given us none of the documents we asked  
14 for in his deposition notice.

15 Your Honor, enough is enough. We're asking Your  
16 Honor to enforce what Rule 37(c)(1) says which is that you  
17 don't comply with the expert disclosure rule you don't get to  
18 use the expert.

19 Let me take two other examples that are on the high  
20 end of the egregious list. Mr. Sudra and Mr. Weinstein. You  
21 previously directed them to provide new reports that would  
22 allow an objective reader to trace through their calculations  
23 and determine how they came up with their numbers and you  
24 directed that at our hearing on August the 24<sup>th</sup>. We have  
25 gotten what purport to be supplemental reports from both of

1 these gentlemen and they are still riddled with problems that  
2 prevent us from replicating their calculations. Enough is  
3 enough. We're asking Your Honor to exclude these experts. As  
4 you'll see from the letter that I sent on the 15<sup>th</sup> and the  
5 emails that we attach to it as exhibits that detail the  
6 problems with these reports and the inability to replicate the  
7 calculations that are contained therein. It's appropriate at  
8 this point two months after this material is due on March 25<sup>th</sup>  
9 to exclude these experts from testifying in the case. The  
10 plaintiff should not be able to indefinitely violate your  
11 orders, violate the rules and keep getting do overs.

12 THE COURT: The question is -- the plaintiffs can  
13 talk about the specific issue that Mr. Hill raised but to me  
14 the rules always contemplate the question of why before we  
15 determine [inaudible - phone cuts out]. Is there any  
16 explanation for the, for example, the one who's got 110  
17 footnotes and 98 are identified? What's the story there?

18 MR. YALOWITZ: Your Honor, I have Rachel Weiser on  
19 the phone who's been dealing with this. I suggest that she  
20 speak to it.

21 MS. WEISER: Yes, Your Honor. Thank you. Let me  
22 first say, Judge, you mentioned right at the beginning of this  
23 that you're not sure how you ruled on the issue of compliance,  
24 and I do think it's important that we stress that nothing has  
25 been found to be non compliant. Most of what we're doing is

1 above and beyond. For example, the footnotes that we're  
2 getting for defendants we're getting because they say they  
3 can't find them. Clearly we couldn't handle that before the  
4 reports were submitted. Those are things that have to be done  
5 by definition after the reports [inaudible - phone cuts out]  
6 so defendants can tell us what they're having trouble  
7 locating.

8           So with regard to the footnotes, I'll start there.  
9 We have been working literally at a frenzy pace. Magistrate  
10 Judge, I'm not sure how to describe to you how many people we  
11 have working on this full time gathering these things, trying  
12 to help our experts. Our experts are involved trying to get  
13 these things done at great expense to us but we're doing it  
14 and we're following up as far as we can getting the things as  
15 fast as we can. Professor Karsh is in Finland. Those  
16 footnotes are [inaudible - phone cuts out] don't have a  
17 complete set to provide defendants yet which is why I needed  
18 some extra time which is why we asked the Court for some extra  
19 time but I assure you these things are being worked on. We've  
20 already presented the defendants hundreds of footnotes, many  
21 of which were easily opened, were publicly accessible, things  
22 that they already had in their possession but we did it  
23 anyway. We took the time to locate these things and produce  
24 them even though many of them they should have been able to  
25 find on their own.

1           So with regard to the footnotes, Judge, I assure you  
2 we're working diligently. We [inaudible - phone cuts out] no  
3 less than ten emails on this filled with hundreds of footnotes  
4 and we're continuing to work on it and I'm hoping very much  
5 that we'll have that done in the next -- by early next week if  
6 not by the end of next week which is the time that we  
7 requested.

8           With regard to Saldry [Ph.] and Weinstein, the  
9 economic expert reports, Your Honor, I went back to those  
10 experts. I explained your concerns very clearly. They both  
11 shared with me that they both testified in federal court.  
12 Their reports were always sufficient. They would do the best  
13 they could to try to make some more clear but that certainly  
14 any questions that defense counsel had they would be able to  
15 answer quite clearly at deposition. That's how it always has  
16 been done. Regardless, I asked them to please write  
17 supplemental reports with more detail and they did. I got an  
18 email back from Mr. Hill explaining some of the things they  
19 still don't understand and I have a call scheduled with the  
20 expert early next week to go over those things.

21           So the most I can tell you, Judge, is that we are  
22 working as hard as we can and as fast as we can.

23           MR. YALOWITZ: Your Honor, it's Kent Yalowitz. If I  
24 could just add one thing. We're new to the case and so I've  
25 been observing a lot of the email traffic and obviously I'm on



1 one side. So I have the perspective of the plaintiffs but I  
2 have to say in my 25 years of practicing law I have never seen  
3 the degree of demand from the defense side or from any side  
4 for that matter for every little thing where a lot of it was  
5 publicly available. I noticed one thing where the defense was  
6 saying we can't find this document and it was some  
7 congressional budget office document. I said well, how can  
8 they not be able to find a congressional budget office and I  
9 went on the internet and Googled it and I found it in about 30  
10 seconds. So I'm sure that both sides here are operating in  
11 good faith here. I have no doubt about it but to come in and  
12 yell about the Court's orders are being flaunted, that's just  
13 not the reality of what's going on here and I'm sort of  
14 surprised that Miller & Chevalier would be taking that  
15 position frankly.

16 MR. HILL: Well, Your Honor, the email that were sent  
17 are all attached to my letters. The Court can review them and  
18 determine whether we're doing anything unreasonable or  
19 inappropriate. I invite the Court or the Court's clerk to  
20 look at the footnotes particularly in the Karsh report and see  
21 if they can locate them online because they are so diminimus  
22 as to be useless and that does not comply with Rule 26 which  
23 required the reports to disclose the facts or data considered  
24 by the witness in forming the opinions. That was the basis  
25 for our requests a month ago. It's still the basis for our

1 request today. We'd ask the Court to not allow the plaintiffs  
2 to continue to be able to dictate what the schedule in the  
3 case is going to be and exclude these witnesses so we can  
4 proceed.

5 THE COURT: Well, let me again remind you of the one  
6 thing that was -- I said in the beginning. That is that we  
7 have not reached the legal issue of whether or not the  
8 compliance with Rule 26 requires the footnote disclosure that  
9 we're talking about. Obviously experts go and rely on a lot  
10 of different things, some of which can be found; some of which  
11 can't be; some of which is just a matter of experience that  
12 the experts have.

13 As to whether or not the [inaudible - phone cuts  
14 out] orders, that's really my call as to whether or not I  
15 believe they are making good faith efforts to respond to the  
16 concerns which I've raised and in that regard -- regardless of  
17 which parties appear before me I always take a reasonableness  
18 approach and I don't see the information that's being sought  
19 to be produced as the subject of dilatory tactics by the  
20 plaintiff. If it turns out that there is concrete evidence  
21 that the plaintiffs are deliberately delaying that would be  
22 certainly something I would listen to but as for now my main  
23 concern is that we get all of the relevant information in this  
24 as quickly as possible. I know that sometimes parties are  
25 more optimistic about how long it will take them to do things

1 [inaudible - phone cuts out] not hold that against a party  
2 once they find out that [inaudible - phone cuts out] which  
3 they have to deal with.

4 But I will take it that [inaudible - phone cuts out]  
5 can in terms of compliance by a week from today. At that  
6 point the parties can draw a line in the sand and [inaudible -  
7 phone cuts out] that either the plaintiffs produced enough or  
8 the defendants can say you haven't produced enough with it on  
9 that basis but I advise both sides to [inaudible - phone cuts  
10 out] with caution on this notion about who's to blame because  
11 if we're going to do this we're going to do it which means  
12 that I will have a hearing. I will have a hearing at which I  
13 will have the parties express their positions with all the  
14 evidence that they have and I will hold the attorneys  
15 personally responsible for the delay caused by such a hearing  
16 by whoever turns out to be at fault. High stakes with this  
17 one.

18 There's a lot of information. There's a lot of  
19 things that the parties have to do. If you have the  
20 [inaudible - phone cuts out] of your convictions you can draw  
21 your lines in the sand. We'll have a hearing. I'll air it  
22 all out and I will hold the attorneys personally responsible.  
23 I hope that's clear because I think it will delay us getting  
24 to the end of the discovery of the facts and of the experts,  
25 and I'm not going to do it based upon either of your

1 representations about whether or not it's [inaudible - phone  
2 cuts out] necessary. I'll have you come in and I'll have you  
3 [inaudible - phone cuts out]. Am I making myself clear?

4 MR. HILL: Your Honor, Brian Hill. I understand.

5 THE COURT: As to the plaintiff's application to  
6 replace the expert [inaudible - phone cuts out], obviously at  
7 this late date they're always concerned about replacing an  
8 expert. Am I to understand that the plaintiffs have an expert  
9 in mind to replace this expert?

10 MR. HORTON: Your Honor, this is Phil Horton. Yes,  
11 we have an expert in mind engaged and working. He anticipates  
12 he will be able to complete his work by the end of the second  
13 week of June. I hope we don't run into the situation that you  
14 just mentioned where sometimes people are hopeful they can do  
15 more than they can. Obviously he's new to the case but as  
16 soon as Mr. Shockhead [Ph.] withdrew we immediately moved to  
17 find a substitute expert to get him to work and that process  
18 is happening but he's engaged and he's at work.

19 THE COURT: Then just for the parties to understand,  
20 to a large extent the question here is whether or not this  
21 particular expert is duplicative of other experts. I know  
22 we're talking about the multiple liability experts but I  
23 understand the plaintiffs to be asserting that the particular  
24 area that the expert was to opine on was separate and apart  
25 from the areas that the other liability experts were going to

1 opine on. Is that correct?

2 MR. HORTON: That is correct, Your Honor. The  
3 situation we face of course is what we were talking about are  
4 liability experts. So they are talking about different facets  
5 of the same issue. Not surprisingly with each expert working  
6 independently and producing their own report one sees some  
7 duplication in the background sections of the reports. So --  
8 but that's all an issue to be taken up at trial. We were not  
9 going to present duplicative experts. We're going to present  
10 experts who will each have their own area to talk about even  
11 though they're -- as I say they are all related issues but  
12 just because they're independent reports and have some  
13 duplication in them they're not going to stand on those -- get  
14 up on the stand and read those reports. Obviously we will  
15 [inaudible - phone cuts out] all of their testimony at trial  
16 and that would be the time to deal with any claim of  
17 duplication not based on a report.

18 THE COURT: Again, following up on what I said  
19 before, it's very difficult given the nature of the expert  
20 reports and certainly in the absence of their depositions to  
21 know how much overlap there is, whether or not the experts  
22 have provided enough information, whether or not their  
23 testimony would cause any changes. I do want the -- I do want  
24 it to be clear that when the smoke clears if I find that there  
25 have been any improprieties or misrepresentations I will act

1 accordingly. So anything that I say now in terms of going  
2 forward is based on the representations that have been made  
3 and as I see the case now in terms of the difficulty of just  
4 trying to figure out what an expert is saying or doing until  
5 you've dotted all the I's and crossed all the T's. It is my  
6 expectation that the depositions of the experts will bring  
7 some clarity to what they've been about and how it fits  
8 [inaudible - phone cuts out] total [inaudible - phone cuts  
9 out] scheme. So --

10 MR. HORTON: Just to be clear, Your Honor, at  
11 depositions I anticipate that defendant's counsel will ask  
12 similar questions of multiple experts because these are  
13 related issues. So they now -- they may well get duplicative  
14 testimony because that's what they've asked. That doesn't  
15 mean that we're going to put them all on the stand to have  
16 each one of them go through the same thing over and over  
17 again.

18 THE COURT: Counsel, you're stating the obvious. You  
19 have to give me some credit.

20 MR. HORTON: I'm sorry, Your Honor.

21 THE COURT: I can see the difference between common  
22 questions and the need for a particular expert. Clearly  
23 they're talking about incidents that will have some  
24 similarities and I expect there to be some similarities and  
25 overlap in their testimony but the real question is whether or

1 not they provide a unique aspect that is not covered by the  
2 other experts. I would certainly expect that at trial not  
3 only would they testify only about the unique aspects but that  
4 the Court wouldn't let them testify otherwise. I presume that  
5 when you -- this number of experts the judge will have you  
6 make it clear about which aspects they're going to testify to  
7 to make sure that there isn't unnecessary duplication.

8 MR. HORTON: That's exactly what we would anticipate  
9 and how we intend to proceed.

10 THE COURT: With respect to the application to strike  
11 the liability expert, the three liability experts that  
12 defendants have [inaudible - phone cuts out] that application  
13 is denied. Again, indicated [inaudible - phone cuts out]  
14 clear to all the parties I expect [inaudible - phone cuts out]  
15 cleared up when the depositions of the experts are taken.  
16 That includes some of the issues that have been raised before  
17 concerning the understanding of what's in [inaudible - phone  
18 cuts out] reports.

19 I don't see a basis for excluding the reports at  
20 this point and I don't see anything improper as to the weight  
21 that would be accorded or how it will look when it gets to  
22 trial. That certainly is a different issue but --

23 MR. HILL: Your Honor, this is Brian Hill. If I  
24 could just be heard briefly. The facts I think are  
25 undisputed. Mr. Kaufman's is the most egregious. There were

1 2,500 pages of foreign language material that were produced  
2 for the first time in the case with his report that were  
3 responsive to discovery requests we served in August of 2001  
4 and Your Honor put the plaintiffs on notice at least twice  
5 during the course of fact discovery that if materials were not  
6 produced during fact discovery the experts would not be  
7 allowed to rely on them. These are materials the plaintiffs  
8 acquired and could have acquired during fact discovery. So  
9 the whole purpose of having fact discovery before expert  
10 discovery was so that the factual record could be fixed so  
11 that the parties would know what the factual record was when  
12 their experts worked on it. The plaintiffs have totally  
13 violated that premise and violated your direction to produce  
14 the material on pain of having the expert precluded.

15 THE COURT: When you do --

16 MR. TOLCHIN: Your Honor, this is Bob Tolchin here.

17 THE COURT: Mr. Hill --

18 MR. TOLCHIN: [Inaudible - phone cuts out] find that  
19 Mr. Hill is exaggerating. This case was filed in 2004. So  
20 surely no discovery demands were served in 2001.

21 THE COURT: Okay.

22 MR. HILL: I meant 2011. I misspoke if I said 2001.

23 THE COURT: Okay. Well, first of all, I tried to  
24 speak and unfortunately the phone doesn't let me do that. I  
25 think I've made myself clear. To the extent that [inaudible -



1 phone cuts out] deposing these witnesses, the plaintiffs have  
2 made certain claims about the [inaudible - phone cuts out]  
3 that have been produced. It's not my inclination to try to  
4 sort that out as to which documents were responsive, which  
5 were -- which the expert in his -- in what experts do came up  
6 with. We're dealing with documents that are in foreign  
7 languages. There are lots of issues here and if the  
8 deposition doesn't make it clear one way or the other then I  
9 don't think that having a hearing before me to try to sort  
10 this out is going to be more efficient because for one thing I  
11 don't see the efficacy of having the expert who I think would  
12 be an important factor in terms of determining how and when he  
13 looked at the documents and how they fit in with anything he  
14 was told by plaintiff's counsel.

15 MR. HILL: Am I to understand Your Honor then will  
16 allow me to revisit this issue once we've deposed the expert  
17 and established when they received the materials? I think  
18 it's actually undisputed that the plaintiffs didn't produce  
19 the materials before the close of discovery and instead waited  
20 to produce them with the expert's report which is I think  
21 precisely the scenario Your Honor was warning them against in  
22 March of last year. I don't think there's any dispute about  
23 the facts that material responsive to discovery requests was  
24 not produced prior to the close of fact discovery and now the  
25 expert Kaufman is basing his opinions on that unproduced

1 material.

2 MR. TOLCHIN: Your Honor, that is very much in  
3 dispute. The point is we did not have these materials in our  
4 custody back then. These are materials that the expert  
5 identified much later in the process after the close of  
6 discovery as experts do. We could not produce in discovery  
7 materials that we did not have and that we did not know the  
8 expert was going to rely on. It's as simple as that.

9 MR. HILL: Just to differ with that --

10 MR. YALOWITZ: This is Kent Yalowitz. I apologize  
11 for interrupting.

12 THE COURT: Counsel. Counsel. Counsel, hello.

13 MR. YALOWITZ: Yes, sir.

14 THE COURT: Let's be clear. You all are making my  
15 point. I'm not going to decide this. I can't decide this  
16 based upon the kinds of representations that counsel are  
17 making. If I were to decide this based upon the issues that  
18 are being raised by Mr. Hill and disputed by the plaintiffs  
19 I'd have to have a hearing. There would have to be an in  
20 depth hearing to determine where all these documents fit.  
21 I'll have to have the expert here in order for it to be a  
22 complete hearing. I'm not doing that.

23 MR. HORTON: We understand that, Your Honor. We're  
24 just trying to make sure our position is clear. That's all.

25 MR. YALOWITZ: You're absolutely right that we would

1 have to go through such a process if it were to be pushed that  
2 far.

3 THE COURT: Because we're talking -- to exclude  
4 experts, to sanction parties, this is a very serious issue for  
5 me and I'm not going to -- I hear what each side is saying but  
6 I'll be honest with you. I know you're all very familiar with  
7 this case. It's not a case where I can just say well, I  
8 understand that this is definitely responsive, I understand  
9 that this is something that the expert came up. That's not  
10 something that's easy for me to do. I will have to get you  
11 all together. You'll have to identify the documents. I'll  
12 have to go through them. My law clerk will have to go through  
13 them. If the expert is implicated I'll have to see how the  
14 expert -- how the expert interfaced with [inaudible - phone  
15 cuts out] came up with, when did he get them. This is not a  
16 simple process. If I go through that process, first of all,  
17 it would be diverting us from the liability issues and it  
18 wouldn't be pretty.

19 So, yes, I get to depose the experts and we're  
20 talking about doing it at a time when presumably you're going  
21 to depose all of the experts but I just can't take these  
22 representations and I confess I can't sort them out with  
23 sufficient definitiveness to make the ruling depend on the  
24 representations that counsel are making concerning when the  
25 documents were produced and whether or not they're responsive

1 I might also add that while I know that Mr. Hill has  
2 made representations about my former statements, I have not  
3 gone back and looked at those statements to see exactly what  
4 context they were made in and what it is that I was saying. I  
5 don't have -- some context I'm clear and definitive and then  
6 other contexts [inaudible - phone cuts out] not. So I don't  
7 know what we were talking about at the point and [inaudible -  
8 phone cuts out] what I was referring to --

9 MS. WEISER: Your Honor --

10 THE COURT: I don't if I meant that to be a blanket  
11 statement about or even if it applied to the [inaudible -  
12 phone cuts out] we're talking about now.

13 MS. WEISER: Your Honor --

14 THE COURT: Yes.

15 MS. WEISER: I did go back and look at that  
16 transcript, Your Honor, and it's completely inapplicable. In  
17 fact, I would go so far as to say that Mr. Hill is actually  
18 misleading the Court about what he said. Your statement  
19 relied specifically, directly and only to damages evidence  
20 which clearly damages evidence is in the possession, custody  
21 and control of the plaintiff and we could understand why the  
22 Court would require us to produce that in advance, things like  
23 medical records and economic IRS reports and things are like  
24 are clearly things that we would need to produce before the  
25 close of discovery. It's absolutely not relevant at all to

1 any of these productions that Mr. Hill is complaining about.

2 THE COURT: Okay. Well, again, I think you're only  
3 restating what I said, that is first -- before I took into  
4 account whether or not it was violative of any of my orders,  
5 I'd go back and look at the context in which I made the  
6 statements and see what I meant to order. As I said, I  
7 haven't even done that because it was not my anticipation that  
8 I was going to address this on the level that the defendants  
9 have [inaudible - phone cuts out] liability experts but that  
10 would be my first step.

11 But I don't think that would be efficient under the  
12 rules and I don't think that would advance the cause of  
13 dealing with the substantive issues that have been raised in  
14 the lawsuit.

15 The last issue that I have is the defendant's  
16 renewed application for sanctions related to the claims of  
17 plaintiffs Oz and Gueda. I am not prepared to -- I see that  
18 the defendants have re-asserted it and I'm not prepared to  
19 impose sanctions at this point related to those claims.  
20 Again, I will say that when it comes to any application of  
21 sanctions that requires me to do a complete review of the  
22 rules that might lead to sanctions and I'm not in a position  
23 to do that at this point.

24 MR. HILL: Your Honor, I did not hear the last thing  
25 you said. There may have been some noise taking you away.

1 THE COURT: I said I'm not in a position to do that  
2 at this point. Sanctions are -- sanctions always require me  
3 to first [inaudible - phone cuts out] and find out how much  
4 fault there is and who that fault [inaudible - phone cuts  
5 out].

6 MR. HORTON: Thank you, Your Honor. I believe that  
7 should cover everything that was on the plate for today.

8 MR. HILL: Your Honor, I'm very sorry but for some  
9 reason I did not hear anything you said other than who is at  
10 fault and then there was a long pause.

11 THE COURT: I'm not sure what -- of course the courts  
12 don't have the budgets of the big companies. So government  
13 phones are not state of the art.

14 MR. HORTON: Your Honor, I think there may be some  
15 interference. Somebody may be on a cell phone or something or  
16 there may be some typing in the background that's --

17 THE COURT: The bottom line is that the -- I'm not  
18 imposing sanctions at this time on -- with regard to the  
19 claims of Oz and Gueda.

20 MR. HORTON: Thank you, Your Honor.

21 THE COURT: Everything else was just gravy I said but  
22 that's the bottom line.

23 MR. HILL: Your Honor, as the person who may at some  
24 point be serving expert reports in the case, at this point do  
25 we have any new deadlines based on Your Honor's rulings today?

1 Hello?

2 THE COURT: Well, the short answer is obviously you  
3 do have new deadlines but I think your question was more what  
4 would the deadlines be.

5 MR. HILL: Yes, Your Honor, because I have people at  
6 work and I need to know when I need to finalize their reports.  
7 As I understand it you've allowed the plaintiffs until a week  
8 from today to complete their document productions for their  
9 prior reports and then I'm not sure we have a date for the new  
10 Mr. Shockhead report. I heard the end of -- the second week  
11 of June. If we could get a date for that perhaps we could go  
12 ahead and set a new schedule for our reports 30 days after  
13 that date and plaintiff's rebuttals 30 days after that date  
14 but I think we're missing the date for when the new expert  
15 report would be produced.

16 THE COURT: You're also assuming that I'm going to  
17 give you the time based on -- the replaced Mr. Shockhead  
18 report.

19 MR. HILL: That is what I had requested. Obviously  
20 Your Honor is in charge of setting the deadline. So that's  
21 why I raised it.

22 THE COURT: While I understand responding to that  
23 report requires additional time I don't know that the other --  
24 we're talking about a large number of experts and we're  
25 talking about replacement.

1 MR. HILL: Correct, Your Honor. Not all of my  
2 experts would need to respond -- well, I don't know what the  
3 new report says yet but presumably not all of my experts would  
4 respond to it. I think it makes sense to keep everybody on a  
5 single deadline as opposed to having a deadline for some of my  
6 experts and then an different deadline for whoever is  
7 responding to that report but obviously we'll do whatever Your  
8 Honor prefers. I think I should have at least in fairness 30  
9 days from the completion of the document production but again  
10 as Your Honor wishes.

11 THE COURT: Okay. Can the plaintiff weigh in on, for  
12 example, the Shockhead replacement? You said the second week  
13 in June?

14 MR. HORTON: Yes. He believes he can be done by the  
15 end of the second week in June which would put us at June 14<sup>th</sup>.  
16 I certainly hope he can hold to that because he's starting his  
17 work -- I mean he has started his work. So let's -- why don't  
18 we go with that if that's acceptable and if there's some  
19 difficulty we'll obviously let everybody know as soon as  
20 possible.

21 THE COURT: Okay. While in general I agree with Mr.  
22 Hill that it makes sense to have a single deadline, given the  
23 history of this case I think we'd be better served if we did  
24 the Shockhead replacement on that one on a separate schedule  
25 and assume that the plaintiffs will complete their



1 supplementation by the 24<sup>th</sup> of May and Mr. Hill will have 30  
2 days from that time to [inaudible - phone cuts out] whoever is  
3 responding to the Shockhead replacement.

4 MR. HORTON: So that would be June 24<sup>th</sup> which is a  
5 Monday.

6 MR. HILL: Your Honor, may I beg the Court's  
7 indulgence. I'm actually scheduled to be on vacation that  
8 week of June 24<sup>th</sup>. So if I could have at least --

9 MR. HORTON: So you want to do it earlier?

10 MR. HILL: I'd like to do it earlier or later. It  
11 will be very difficult to complete the report --

12 MR. HORTON: Your Honor, we have no desire to make  
13 any difficulty for Mr. Hill and his vacation. If he wants a  
14 little bit more time that's fine.

15 MR. HILL: Again, is the Court anticipating that on  
16 this -- on our next deadline we would produce reports from all  
17 of our experts or just those that won't respond to the new  
18 report? I rather not have an expert do two reports if we  
19 don't --

20 THE COURT: The experts who will not be responding to  
21 what I'll call the Shockhead report.

22 MR. HILL: Okay.

23 THE COURT: I'm sure if you've been dealing with me a  
24 while you understand that I'm not going to impose upon you if  
25 you're going to be taking time off. I know you all work very

1 heard.

2 MR. HILL: Well, Your Honor, I'm returning from my  
3 vacation for full disclosure on Sunday the 30<sup>th</sup> of June. If I  
4 could have -- then the next week is the 4<sup>th</sup> of July. So if I  
5 could have until Monday, July 8<sup>th</sup> I'd appreciate it. Now, for  
6 what it's worth, that's only a week before the response to the  
7 Shockhead report would be due anyway but I would take Monday,  
8 July 8<sup>th</sup> if the Court will allow it or if we could put  
9 everything on a unitary schedule on July 15<sup>th</sup> that's also  
10 obviously okay with me but I defer to the Court.

11

12 MR. YALOWITZ: Perhaps if I may suggest, Your Honor.  
13 Perhaps this is the kind of conversation counsel could have  
14 with each other. I know there's been some history but I'm  
15 hoping that we might actually be able to agree on some things  
16 and we could come to the Court with a proposal. Maybe that's  
17 being unduly optimistic but sometimes counsel in cases  
18 actually work scheduling matters out and [inaudible - phone  
19 cuts out] Court.

20 THE COURT: In view of the fact that we're really  
21 talking about now -- it almost seems that we're talking about  
22 a convergence of the date. Understand that I really don't  
23 want any slippage once you've come up with a date now though.  
24 I mean --

25 MR. HILL: I don't anticipate difficulty getting

1 everything done by July 15<sup>th</sup> sitting here today.

2 THE COURT: Okay. Well, who is it that said perhaps  
3 the lawyer can propose?

4 MR. YALOWITZ: It was Yalowitz.

5 THE COURT: Mr. Yalowitz, I have a sense of what  
6 you'd be proposing but why don't you submit -- why don't the  
7 lawyers get together and submit a proposed schedule which  
8 takes into account the things that we've just discussed? It  
9 might also be a good opportunity to at least get some momentum  
10 where you can agree on something.

11 MR. YALOWITZ: It would be -- obviously we're heading  
12 in at this point to vacation season. Other people will be off  
13 so we're all going to need to confer to figure out who's  
14 around when to come up with a schedule that makes sense.

15 MR. HORTON: I think if we can agree on things that  
16 would be a step in the right direction here.

17 THE COURT: It's certainly my hope. Again, the  
18 parameters have been tossed around. If it's nothing  
19 particularly different from what we've discussed and I  
20 anticipate that I'm -- I'm very much in favor of you working  
21 together on anything even if it's just scheduling.

22 MR. YALOWITZ: Who knows? Peace could break out in  
23 the Middle East.

24 THE COURT: I think that in this litigation it would  
25 be helpful.

1 MR. YALOWITZ: One step at a time.

2 THE COURT: So you'll submit that to me -- by the end  
3 of next week is fine.

4 MR. HILL: A proposed schedule by the end of next  
5 week?

6 THE COURT: Right. All right. We've made some  
7 progress at least to making this civil litigation more civil.

8 MR. YALOWITZ: We're all in favor of that, Your  
9 Honor.

10 THE COURT: We'll be adjourned. Thank you.

11 ALL PARTIES: Thank you, Your Honor.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

\* \* \* \* \*

I certify that the foregoing is a court transcript from  
an electronic sound recording of the proceedings in the above-  
entitled matter.

---

Shari Riemer

Dated: May 19, 2013